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ABSTRACT

This paper discusses the potential impact of a federal bill, H.R. 2797, or the Religious Freedom Restoration Act, on public education. A concern is that legislation will be interpreted more strictly than the normally broad constitutional standards, which may result in a lack of support for treating schools differently than other public entities. The ramifications of the act for the following specific concerns are discussed: distribution of religious materials; religious dress issues; accommodation for religious beliefs; home schooling; compulsory attendance; and curriculum. Situations in which school districts may legally restrict the distribution of religious materials in schools are described in detail. The consequences of defining a school as a public forum, a limited public forum, or nonpublic forum are described. For example, if a school were determined to be a limited open forum, certain communications can be banned. Other restrictions, such as time, place, and manner, also apply. H.R. 2797 is appended. (LMI)

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FIRST AMENDMENT, FREE EXERCISE AND ESTABLISHMENT CLAUSE CHALLENGES FOR SCHOOL DISTRICTS

by

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NOLPE EDUCATION LAW SPRING SKI SEMINAR MEETING
FEBRUARY 28 - MARCH 3, 1993
BRECKENRIDGE, COLORADO

RELIGIOUS FREEDOM RESTORATION ACT

In the material which you have received, there is a copy of a bill, H.R. 2797 which has the support of members of Congress from the far left and far right of the political spectrum, i.e. from liberal to conservative. In addition, it has the support of such diverse groups as the American Civil Liberties Union, the American Jewish Congress, the National Association of Evangelicals, the Rutherford Institute and was personally supported by Pat Robertson and Jerry Falwell. Yet, there is more than a little concern over this piece of legislation because of its potential impact on education. It probably will pass, but the question is "In what form?" The culprit or the cause of this legislative proposal is the U.S. Supreme Court decision in Employment Division Department of Human Resources Oregon v. Smith (494 U.S. 872 (1990.) Prior to that decision, laws of general applicability could be challenged under the free exercise clause of the U.S. Constitution. Proponents of free exercise point to Sherbert v. Verner and Wisconsin v. Yoder which had developed the standard that laws of general applicability that burden a legitimate and sincerely held religious belief could be upheld only if the state had a compelling state interest. The Court, in Smith, used a much lessor standard when it denied two native Americans unemployment compensation benefits when they were discharged from their jobs with a drug rehabilitation group for using peyote. The standard was reasonableness. Since that decision, the courts have upheld zoning regulations, the fair labor standards act, state licensing provisions, fire codes, state laws requiring autopsies and the age discrimination employment act as they apply to church groups. Thus, virtually every religious organization except the U.S. Catholic Conference has helped draft and push the Religious Freedom Restoration Act.

That bill will be reintroduced within the next month in the U.S. Congress with the support of the President of the United States - hopefully, with the amendments which we succeeded in adding to this bill in the last Congress. My overall concern

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with this legislation is as follows:

- Special care must be taken in drafting legislation. Constitutional standards are normally broad, leaving courts an opportunity to fashion opinions based on the particular situation but legislation is far more restrictive and courts tend to follow the exact language or exact black letter law no matter what the consequences. The Supreme Court has tended to treat schools and public school students differently than other public entitles and their beneficiaries. See e.g. Fraser, Hazelwood, school prayer cases and aid to private church related school cases. There may be no support for such treatment under the proposed statute.

What are my specific concerns:

- Distribution of Religious Materials. Currently there are free speech cases in which school districts can use time, place and manner restrictions even in a limited public forum. New litigation would be based not on free speech rights but the statute. How would "least restrictive means" apply to such cases especially when an individual claims his or her religion requires members to evangelize and the school district has a policy that does not permit the distribution of material that is not school related but that non-school related material can be placed on a distribution table in a school library. This is not a hypothetical situation. The young boy in North Carolina who received national press because of his religious fervor believed that his soul was dammed if he did not convert all his classmates to his religion.

- Religious Dress/Garb Issues. (We are not referring to the wearing of a Cross or Star of David but rather religious dress that indicates religious authority). Schools currently hire individuals from religious orders or clergy. Under the proposed law can we restrict the wearing of such dress as inappropriate in a public school setting even if the wearing of the garb is not an establishment clause violation?

- If Ansonia v. Philbrook, a Title VII case, were retried under this statute would the outcome be different? The court in Ansonia held that our accommodation for religious beliefs was reasonable and we did not have to accept the accommodation demanded by the employee.

Section 3(b) of the bill does not use the word "reasonable."

- Home Schooling. Using the U.S. Supreme Court dicta in Pierce v. the Society of Sisters, states have developed regulations wherein home schools are placed under reasonable control. The argument we have heard in many states from opponents to any control is that the standard states must use when regulating home schooling is "lease restrict means." Does this legislation overturn these current state laws and regulations because the bill uses language similar to that propounded by the "advocates"?

- Compulsory Attendance. All states have compulsory attendance laws. The U.S. Supreme Court held that such laws should not have applied to the Amish in Wisconsin v. Yoder. However, this decision was narrowly crafted because of the laws' impact on a minority culture, a situation which would be hard to replicate.
Does the proposed statute place all compulsory attendance laws in jeopardy for anyone who shows a burden on his or her religion no matter how slight?

- Curriculum. In its current form H.R. 2797 could have a major impact on a school district's ability to maintain control over curriculum matters. Time and time again school districts have had to defend in court, curriculum decisions because some religious groups wish to have their children excused from reading or using certain text books because the books are neo-paganistic, secular humanistic or promote witchcraft. We are all comfortable in defending these cases under the provisions of the United States Constitution but are worried about suits brought under the statute. Not only could the results be different in court but school districts under severe financial constraints would concede rather than risk costly litigation.

Let's turn from the Religious Freedom Restoration Act to:

DISTRIBUTION OF RELIGIOUS MATERIALS

Many religious groups have never considered the Equal Access Act anything more than a stepping stone to their real goal - namely, an opportunity to proselytize or evangelize those children in school who are not of their religious persuasion. Soon after the U.S. Supreme Court decided the case of *Westside Community Board of Education v. Mergens*, those of us in public education began seeing the publication, *A Field for the Harvest* produced by Christian Advocates Serving Evangelism (C.A.S.E). The pamphlet declares *God has opened a huge mission field. Our missionaries to this field must be our high school students.* It must be emphasized at this juncture that the opinion of the U. S. Supreme Court in the

Mergens case was relatively narrow in that it held that the Equal Access Act was constitutional and then defined what was required of school districts under the Act. The court did not announce or proclaim any new constitutional rights for students as has been suggested by some of the group.

Furthermore, the pamphlet declares *Students have the right to pass out christian papers and tracts to their peers on campus. As long as the students do not disrupt school discipline, school officials must allow them to be student evangelists.* Another publication *First Amendment Guidelines for Public Schools* written by Student Action for Christ, Inc. declares *Can students distribute religious literature at school? Yes!*

School Districts may restrict the distribution of religious materials in schools, provided they do so properly.

What can a school board do under these circumstances? Since religious discussion and worship are forms of speech and association, school boards must first look to what restrictions on free speech are permitted under the First Amendment. *Widmar v. Vincent* 454 U.S. 263 (1981)

According to the U.S. Supreme Court in *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. 788, 799 (1985) *Protected speech is not equally permissible in all places and at all times.*

The courts have drawn distinction on restricting protected speech based on whether there was in place, a public forum, a limited public forum or whether the site was a non-public forum.

Streets, parks etc. have been held immemorial for public assembly. The state may not prohibit all communication activities. It can, however, restrict certain content based expression provided there is a compelling state interest and the restriction is narrowly drawn. *Perry Education Association v. Perry Local Educators' Assn.* , 460 U.S. 37 (1983). This standard is, indeed, high and fortunately schools are not public forums. They are either limited public forums or non-public forums.

Again, it must be remembered that the constitutional basis for restricting speech has nothing to do with the Equal Access Act and the U. S. Supreme Court opinion in *Westside Community Board of Education v. Mergens,* 110 S.Ct. 2356 (1990). The majority opinion specifically stated at page 2372 that the court was not deciding the case on the basis of the Free Speech and Free Exercise Clauses. The Act does not grant students the right to distribute religious material.

Turning back to the constitutional issue, the state may open public property in whole or in part and, if it does open the property, it need not do so indefinitely. However, as long as part or all of the property is open forum, that portion open then can be restrictive on the basis of time, place and manner and the protected speech may be curtailed as long as the restrictions are content neutral. In addition, the government in a limited public forum, can confine the activity within the forum to that which is compatible with the intended use. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985). Furthermore, in a non-public forum, the state may exclude all speech, control the subject matter of speech, as long as it is not viewpoint biased, or limit any activity which is compatible with the intended use.

Clearly, advocates for religious groups will contend that schools are limited public forums -- an argument which may have some validity in some secondary schools, but an argument that has little, if any, validity in elementary schools.

Thus, there can be a total ban on the distribution of religious materials at the elementary school level and a similar ban in those secondary schools which do not provide a limited open forum.

Even if a school were to be determined under specific circumstances to be a limited open forum under the constitutional criteria used in *Widmar v. Vincent,* 454 U.S. 263, certain communications can be banned in toto such as:

- indecent, vulgar or lewd material or obscenity using the standard of minors, not adults,
- libelous material,
- material that invades the privacy of others,
- material that promotes unhealthy activities,
- material that promotes illegal activities for minors,
- material that infringes upon someone's copyright,
- advertising or commercial material, and
- all materials from non-student sponsored organizations.

Those materials not covered by those in the list can be restricted in other ways. First and foremost is the restriction commonly referred to in constitutional law as *time, place and manner.*

Students normally pass notes or other information to other students. Any restriction on *time, place or manner* should not be placed on distribution of six or fewer copies. Beyond that number, a school district can:

- require that a student notify the principal in advance of his or her intent to distribute material and have the material reviewed to make sure that it is not contrary to any of the written restrictions,
- prohibit distribution in hallways because of its adverse effect on maintaining order because it could result in a roadblock which restricts the free flow of student movement,
- limit the time of day and the number of days that materials can be distributed,
- require that all materials from all organizations be placed on specific tables in specific rooms,
- hold students responsible for cleaning up materials left on the floor and on the table, and
- require that the distribution be in an orderly manner and not coercive.

On October 28, 1992, the U.S. District Court of the Northern District of Illinois - Eastern Division, issued an opinion in Hedges v. Wauconda which is being appealed as we speak. That Court held that most of the restrictions that the school district had placed on the distribution of religious materials were permissible, however, the Court held that it was unreasonable for a school district to determine that its educational mission was best served by excluding the distribution of non-student prepared materials. Furthermore, it ruled that time, place and manner restrictions may give students the belief that the school has placed it's imprimatur on the material that is being distributed. While this is a "freedom of speech" case, the Court seems to use some of the entanglement arguments against time, place and manner that one would normally see in an establishment clause case. That decision is being appealed.

FULL COMMITTEE AMENDMENTS ADOPD SEPT., 1992.

102D CONGRESS
1ST SESSION

H. R. 2797

To protect the free exercise of religion.

IN THE HOUSE OF REPRESENTATIVES

JUNE 26, 1991

Mr. SOLARZ (for himself, Mr. AUCOIN, Mr. ACKERMAN, Mr. BERMAN, Mr. BRYANT, Mr. CARDIN, Mr. COX of Illinois, Mr. DREIER of California, Mr. DEFAZIO, Mr. EDWARDS of California, Mr. FEIGHAN, Mr. FOGLIETTA, Mr. FROST, Mr. GEREN of Texas, Mr. HOCHBRUECKNER, Mr. HUGHES, Mr. JAMES, Mr. JEFFERSON, Mr. KOPETSKY, Mr. LAGOMARSINO, Mr. LEHMAN of Florida, Mr. LENT, Mr. MARKEY, Mr. MATSUI, Mr. MCMILLEN of Maryland, Mr. MOODY, Mr. MRAZEK, Mr. NEAL of North Carolina, Mr. OWENS of New York, Mr. OWENS of Utah, Mr. PRICE, Mr. SCHEUER, Mr. SCHIFF, Mr. SHAYS, Mr. SMITH of Texas, Mr. STALLINGS, Mr. STUDDS, Mr. TRAFICANT, Mr. TORRICELLI, Mr. TOWNS, Mr. YATES, and Mr. WOLPE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1991".

7/18/91 41 cosponsors

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SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.—The Congress finds—

(1) the framers of the American Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not burden religious exercise without compelling justification;

(4) in Employment Division of Oregon v. Smith the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) PURPOSES.—The purposes of this Act—

(1) to restore the compelling interest test as set forth in ~~Sherbert v. Verner and Wisconsin v. Yoder~~ PRIOR FEDERAL COURT RULINGS

and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is ~~essential to further~~ IN FURTHERANCE OF a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1991," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting "; and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1991" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

~~and~~

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; AND

(4) THE TERM "EXERCISE OF RELIGION" MEANS EXERCISE OF RELIGION UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

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SEC. 6. APPLICABILITY.

(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION.—Federal law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion.

O